No. 22689

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DESERT OUTDOOR ADVERTISING, INC., a corporation, SEYMOUR BUXBOM, and CAROL BUXBOM,

Appellants,

vs.

COUNTY OF RIVERSIDE, a political subdivision of the State of California, RAYMOND C. SMITH, Building Director of the County of Riverside, C. E. CRABTREE, Land Use Administrator of the County of Riverside, ROSS DONLEY, BYRON MORTON, DISTRICT ATTORNEY of the County of Riverside, Municipal Court, Riverside Judicial District, Municipal Court, Indio Judicial District, the Board of Supervisors of the County of Riverside, WILLIAM E. JONES, PAUL J. ANDERSON, NORMAN J. DAVIS, RAYMOND SEELEY and FLOYD McCALL as Supervisors of said County, and RIVERSIDE COUNTY PLANNING COMMISSION,

Appellees.

APPELLANTS' REPLY BRIEF.

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ARGUMENT.

I.

The Doctrine of Abstention Is an Extraordinary Exception to the Duty of a District Court to Adjudicate a Controversy Properly Before It.

Appellees argue that the District Court did not abuse his discretion in applying the doctrine of abstention and thereby denying the injunction and staying further proceedings.

The fallacy of this argument is that it is contrary to the federal law, especially where a federal statute (Highway Beautification Act) is to be interpreted and there is a showing of irreparable injury to the applicants for the injunction in the event of denial.

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only, in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959).

The federal courts have not been reluctant to abstain on the ground of avoiding the hazard of friction in federal-state relations in a great number of governmental activities carried on by the States and their Subdivisions which have been brought into question in the District Courts:

(1) *Hostetter v. Idlewild Liquor Corp.,* 377 U.S. 324 (1964) (action to enjoin the state liquor authority from interfering with business of selling liquor to departing international airline travelers);

(2) *Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713 (1962) (similar question as Hostetter, *supra*);

(3) *Allegheny County v. F. Mashuda Co., supra* (questioning power of state subdivision to condemn property for a private purpose);

(4) *Toomer v. Witsell,* 334 U.S. 385 (1947) (question of state's power to regulate fishing in its waters);

(5) *Public Utilities Commission v. United States,* 355 U.S. 534 (1958) (questioning state's power to regulate intrastate trucking rates);

(6) *Meredith v. Winter Haven,* 320 U.S. 228 (1943) (question of city's power to issue certain bonds without a referendum);

(7) *Chicago v. Atchison, T. & S.F.R. Co.,* 347 U.S. 77 (1958) (questioning state's power to license motor vehicles);

(8) *Truax v. Raich,* 239 U.S. 33 (1915) (questioning state's anti-alien labor law).

A. The District Court Did Not Look to the Merits of the Application for Injunction.

The District Court in this case apparently did not consider the strong probability that the Appellants could lose their entire business in the event the County of Riverside were not restrained from further prosecuting Appellants for the maintenance of their outdoor advertising signs; the District Court did not rule on the merits of the request for an injunction out of regard for the "rightful independence of state governments" and because it is a "permissible policy for the federal chancellor to stay his hand in the absence of an authoritative and controlling determination by the state tribunals", citing *Chicago v. Fieldcrest Dairies,* 316 U.S. 168 (1942).

B. None of the Cases Cited by Appellees Involved Irreparable Injury to the Applicant for Injunction.

In both cases cited by Appellees, *Galfas v. City of Atlanta,* 193 F. 2d 931 and *Palomar Holding Co. v. County of San Mateo,* 283 F. 2d 390, the District Court looked to the merits of the applicants' request for an injunction. In the *Galfas* case the District Court found "That no action was threatened except such a trial of Galfas and that the plaintiffs showed no such imminent danger of irreparable injury as to entitle them to injunctive relief." (193 F. 2d 931 at page 934). The within Court stated in comparing the facts of the *Palomar* case with *Truax v. Raich, supra*:

> "The unusual circumstances there (Truax) were such that the constitutional issue in all probability would never have reached the state courts and that federal intervention was essential if property rights of appellants were to be safeguarded. We do not find such circumstances in this case." (283 F. 2d 390 at page 391.)

Nor was there a serious question of irreparable injury in the *Chicago v. Fieldcrest Dairies* case, *supra.* Fieldcrest Dairies apparently would not have lost its entire business in the event the District Court failed to declare invalid the Chicago ordinance prohibiting said dairy from selling milk in "Pure-Pak" paper containers within the City.

The pleadings in the case before the Court clearly show that appellants' entire business is in jeopardy if the County of Riverside is not enjoined from further prosecuting and threatening to prosecute appellants and the landowners who lease their land to said appellants.

II.

It Is the Practice in Federal Courts to Decide, When Necessary, Questions of State Law, Where a Case Involves Non-Constitutional Federal Issues.

It has from the first been deemed to be the duty of the Federal Courts to decide questions of state law whenever necessary to the rendition of a judgment and, in the absence of some recognized policy or defined principle, denial of that opportunity by Federal Courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

Meredith v. Winter Haven, supra;
Propper v. Clark, 337 U.S. 472 (1949);
Hurn v. Oursler, 289 U.S. 238 (1932);
Chicago v. Atchison, T. & S.F.R. Co., supra.

A. The Language of the Riverside Ordinance Is Not Ambiguous or Difficult to Interpret.

What is more, there is no difficult or uncertain question of state law presented in this case. The amendments by the County of Riverside to its zoning ordinance on September 22, 1960, banned future erection of outdoor advertising signs from its M-3 zone and permitted any of said signs existing at that time to be maintained as a nonconforming use for a period of five (5) years or until October 22, 1965.

23 U.S.C. 131 (e) provides in part:

"Any sign, display, or device lawfully in existence along the Interstate System or the Federal-

aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970."

All of appellants' outdoor advertising signs were, under the language of the Riverside Ordinance, clearly "lawfully in existence" on September 1, 1965.

Where the language of the municipal law or regulation itself contains no ambiguity which calls for interpretation, and where remission to the state courts would involve substantial delay, the District Court, even in cases where there is no issue of irreparable injury, have assumed jurisdiction in spite of the argument that the case be held until the state courts adjudicated the issue of state law.

Chicago v. Atchison, Topeka & Santa Fe R. Co., supra;

Toomer v. Witsell, supra.

B. The Riverside Ordinance, as Applied to Appellants, Constitutes a Taking of Appellants' Property Contrary to 23 U.S.C. Section 131(g), the State Law and the Federal Constitution.

23 U.S.C. Section 131 (g) provides in part:

"(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays and devices—

(1) Those lawfully in existence on the date of enactment of the subsection," (October 22, 1965).

Section 5288.3a of the California Business and Professions Code provides in part as follows:

> "5288.3a. Each removal ordered by the director, on or after the effective date of this section of any of the following advertising displays which is not as of that date in conformity with the provisions of this article shall be deemed a removal under Section 5288.2a and shall be deemed to constitute a taking, within the meaning of the Highway Beautification Act of 1965, subdivision (g) of Section 131 of Title 23 of the United States Code, as in effect October 22, 1965, of all right, title and interest, including any leasehold interest, of the owner of the advertising display and of the right of the owner of the real property on which the advertising display is located to erect and maintain such advertising display thereon:
>
> (a) Advertising displays lawfully in existence on October 22, 1965."

The effect of the Riverside Zoning Ordinance and its criminal provisions, as applied to appellants, is to force appellants, under threat of criminal prosecution, to remove all of their outdoor advertising signs without just compensation. This would result in the destruction of a business whose income is in excess of $50,000.00 per year.

All of appellants' signs are located at strategic places along the federal interstate and federal-aid primary highways in the County of Riverside and therefore are specifically covered by the Highway Beautification Act and the California Business and Profession Code which refers to said federal act. Unless the County of

Riverside is restrained from enforcing its zoning ordinance against appellants and in direct contravention to the above mentioned federal and state acts appellants will lose their entire business without any compensation and without due process.

In *Gregg v. Winchester,* 173 F. 2d 512, cited by the County, the facts were much different than in the instant case. In this case no criminal penalties for infractions were involved, nor was there any showing of irreparable injury or loss of business on the part of the applicants for injunction.

Conclusion.

For the foregoing reasons, Appellants submit that the decision of the Court below should be reversed with directions to hear the application for injunction on its merits.

Respectfully submitted,

WALDRON & BRYANT,
Attorneys for Appellants.